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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

WILLIAM JOSEPH LEGNER,
Petitioner,

VS.

UNION PACIFIC RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the statutory right to jury trial under the Age Discrimination in Employment Act provide for resolution of conflicting evidence and inferences by the jury as trier of fact, including factual disputes over the qualifications of an older employee for available positions and disputed evidence of pretext and if so, what is the appropriate standard of review on defendant's motion for di ected verdict after plaintiff's case in chief?

2. Does the Age Discrimination in Employment Act apply to positions that become available shortly after the termination of an older employee, where the availability of such positions was within the knowledge or reasonable expectation of the employer at the time of termination, but not disclosed or made available to the older employee?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

William Legner respectfully prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit in Legner v. Union Pacific Railroad Company, ... F.2d ....., filed on May 26, 1982.

OPINIONS BELOW

The Opinion of the Court of Appeals is set forth in Appendix A to the Petition. The Court of Appeals' Order denying the Petition for Rehearing and Suggestion for Rehearing En Banc is set forth in Appendix B to the Petition. The Judgment of the United States District Court for the Northern District of California, filed October 16, 1980, is set forth in Appendix C and the Findings of Fact and Conclusions of Law of the District Court, filed October 16, 1980, are set forth in Appendix D. The Order of the District

Court Denying Plaintiff's Motions for New trial and to Amend Findings of Fact and Conclusions of Law, filed December 3, 1980, is set forth in Appendix E. The Oral Rulings of the District Court in favor of Defendant's Motion for Directed Verdict, February 5 and 6, 1980 appear as Appendix F and Appendix G, respectively.

JURISDICTION

The Judgment of the Court of Appeals was filed on May 26, 1982. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on August 31, 1982. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

This case was brought under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, *et sequitur*. The pertinent sections, 29 U.S.C. § 621; 29 U.S.C. § 623(a); 29 U.S.C. § 626(c)(1) and (2) and 29 U.S.C. § 631(a) are set forth in Appendix H to this petition.

STATEMENT OF CASE

(a) Factual Background

Respondent Union Pacific Railroad Company ("Railroad") is a large company that employs over 29,000 employees in nine major departments. Petitioner William Legner was employed in the Railroad's Traffic Department as Assistant Chief Clerk to Traffic Manager Olsen in the San Francisco Northern California Region Office. Among his duties, Legner was responsible for the accounting and bill collection duties for the Region Office, resolution of customer inquiries, and liaison functions between the Railroad's customers and other railroad agencies.

Legner trained a part-time subordinate employee, Borrowman, age 30, as his assistant and supervised Borrowman in the performance of those duties. In April, 1976, Legner was informed that his position and the clerk stenographer position held by Borrowman were going to be abolished when the Railroad installed a centralized lock box accounting system. The lock box system was eventually installed on July 23, 1976. Legner was terminated on July 1, 1976. Borrowman was retained to perform Legner's duties until July 23, 1976 and then reassigned to the position of Clerk in the Manifest Department, effective August 1, 1976.

Legner brought this action in a timely manner, alleging specific acts of age discrimination, including: (a) failure to promote Legner to available Management Training Program positions in May, 1976; (b) failure to transfer Legner to an available Traffic Agent position in June, 1976; (c) the retention of Borrowman to perform Legner's duties and preference given to Borrowman over Legner's objection; (d) the failure to offer Legner a Chief Clerk to General Traffic Agent position available on or before July 23, 1976; and (e) the total exclusion of Legner from personnel planning regarding comparable positions and levels of employment within or outside the region.

Legner was 54 years old at the time of his termination and had a nineteen year service record. Legner began his employment as an entry level stenographer in 1957. In two weeks, Legner was promoted to accounting clerk. In 1958, Legner was promoted to Clerk-Stenographer to General Freight and Passenger Agent. In 1960, Legner was promoted to handle payroll and rate dockets under the Chief Clerk to Traffic Manager. In 1962, Legner was promoted to Ticket Agent; in 1965, to Assistant City Ticket Agent;

and in 1967, to City Ticket Agent. As City Ticket Agent, Legner was responsible for Passenger Department matters in the region, supervised several subordinate employees, consolidated freight and passenger accounts and received high commendations in his personnel file for the performance of his duties.

In May, 1970, the Passenger Department was abolished and Legner was transferred laterally to the position of Assistant Chief Clerk to Traffic Manager Olsen. Legner's immediate superior was Chief Clerk Hrebich. Traffic Manager Olsen was responsible for personnel planning in the San Francisco Northern California Region together with General Traffic Manager Shum located in Omaha, Nebraska. Shum maintained a personnel planning book for the entire Traffic Department in the United States and was knowledgeable of vacant positions in eastern and western United States.

Legner enjoyed the status of a junior management employee. Legner received annual salary increases and merit salary increases under the Railroad's Administration Salary Program, and received the management compensation benefit plan, equal to an added 31.5% over Legner's salary. Legner was annually evaluated by his immediate superior Hrebich and by Traffic Manager Olsen on the Railroad's Executive and Exempt Performance Appraisal Worksheet.[1]

In October-November, 1974, Olsen and Hrebich evaluated Legner and rated him "superior" in collection procedures

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[1]The Railroad's Executive and Exempt Performance Appraisal Worksheet provides for performance appraisal ratings of "outstanding", "superior", "fully competent", "generally adequate", and "Marginal or no rating". It does not provide for any numerical ratings. Plaintiff's Exhibits 4 and 14, Excerpts of Clerk's Record, pages 49 and 55.

and "fully competent" in all other areas. Olsen and Hrebich described Legner as "very effective" at securing any information he lacked, with "complete knowledge" of his position, and that Legner would best utilize his training, background and personal characteristics in either the position of "Chief Clerk to Traffic Manager" or "Traffic Agent." Olsen and Hrebich recommended that Legner was "ready for promotion" to either position of "Chief Clerk to Traffic Manager" or "Traffic Agent," without any reservations.

The next and last evaluation of Legner was in December 1975-January 1976. Olsen and Hrebich rated Legner "superior" in collection procedures and "fully competent" in all other areas. They described Legner as "fully developed" in the position of Assistant Chief Clerk to Traffic Manager and recommended that Legner was "ready for promotion" to "Chief Clerk to Traffic Manager" without any reservations.

The stated Railroad policy was to transfer employees to lateral positions within their region or outside their region in the event a position was abolished. On April 28, 1976, Legner was informed that his position and the position of Borrowman would be abolished with the eventual installation of the lock box system. Hrebich promised Legner that he would be given preference over Borrowman.

On April 28, 1976, Traffic Manager Olsen also met with Legner. Olsen asked Legner if he would accept the position of Chief Clerk to General Traffic Agent in Reno, Nevada. Legner replied that he would accept the Chief Clerk to General Traffic Agent position in Reno, Nevada. Legner attached no limitations. Following this meeting, Olsen never discussed the position of Chief Clerk to Gen-

eral Traffic Agent in Reno with Legner again and never offered it to him. Instead, the position of Chief Clerk to Traffic Agent in Reno was filled by Olsen and Shum with the promotion of manifest clerk Smith, age 26, from a subordinate level position, on July 23, 1976, effective August 1, 1976.

During the period from April 28, 1976 through July 23, 1976, Olsen and Shum actively engaged in long range personnel planning, involving the management training program and positions of Traffic Agent in Oakland, California and in Los Angeles; Chief Clerk to General Traffic Agent in Reno, Nevada, and in Stockton, California; and Clerk positions in the Manifest and Intermodal Departments in San Francisco. Legner was excluded from consideration for these positions. No attempt was made to transfer Legner to any lateral position within the region or outside the region as per stated Railroad policy.

In May, 1976, Traffic Manager Olsen privately recruited and selected a younger employee, Melton, age 30, from the entry level position of clerk-stenographer to the Railroad's management training program. The Railroad did not advertise or publicize the availability of these positions. Notwithstanding his annual evaluations, Legner was neither informed nor considered for this position. At trial, Legner introduced statistical evidence that during the six and one half year period from January 1, 1970 to July 1, 1976, although employees over the age of 40, including Legner, represented sixty percent of the Traffic Department employees, *all* of the eighteen management training program positions were filled by the private recruitment and selection of Traffic Department employees under the age of forty.

On June 24, 1976, Legner was next informed by letter that his position would be abolished at the close of the business day, June 30, 1976, and that his duties were being transferred to Borrowman, although no date was given for the installation of the lock box system. The letter also asked Legner to accept or decline an entry level position of clerk-stenographer. This position represented a demotion, loss of junior management status, loss of the substantial management compensation benefit and retirement plan, and relegation to the performance of receptionist and typing duties in an entry level position.

Following receipt of this letter, Legner learned of an available Traffic Agent position in Oakland, California. Legner met with Traffic Manager Olsen and requested transfer to the Traffic Agent position. Olsen denied Legner's request without explanation. Legner then requested that Olsen retain Legner rather than Borrowman to perform Legner's duties until the lock box system was installed. Olsen refused this request. The Traffic Agent position was subsequently filled by promotion of a 27 year old employee, Mietz, from the subordinate position of rate clerk.

On July 1, 1976, Legner was terminated when he declined to accept the clerk-stenographer position and his above requests were denied. Legner testified he knew from experience that other positions suitable to his ability and level of employment would be available if he was retained instead of Borrowman to perform his duties. Chief Clerk to Traffic Manager Olsen, Hrebich, also testified from his experience and knowledge, that other positions suitable to Legner's ability and level of employment would be avail-

able to Legner if Legner was retained instead of Borrowman to perform his duties.

Traffic Manager Olsen and General Traffic Manager Shum had even greater knowledge. They were actively engaged in personnel planning at the time, resulting in wide-ranging decisions on July 23, 1976, involving the positions of Chief Clerk to General Traffic Agent in Reno, Nevada, and in Stockton, California; Traffic Agent in Los Angeles and Clerk in the Manifest Department and Intermodal Department in San Francisco, among others.

Borrowman continued to perform Legner's duties until July 23, 1976 when the lock box installation was completed. Borrowman was then retained without specified duties until assigned to the position of Clerk in the Intermodal Department, effective August 1, 1976.

(b) The District Court Decision

In the District Court, Legner's allegations of age discrimination were tried before a jury as trier of fact pursuant to the expressed jury trial provisions of the Age Discrimination in Employment Act of 1967, as amended (ADEA), 29 U.S.C. § 621 *et sequitur*. Following the presentation of Legner's case in chief, the Railroad made an oral motion for directed verdict. Ruling from the Bench, the District Court granted directed verdict in favor of defendant and removed any and all questions of fact from the jury.

The District Court ruled that the abolishment of Legner's position was for sound business reasons, that Legner was offered and rejected reasonably comparable alternative employment, and that there was no available position for which Legner was qualified at the time of his termination

(Appendix F and Appendix G). The District Court decision did not reach the specific allegation of age discrimination regarding available positions in the management training program or as Traffic Agent *prior* to the termination of Legner nor the preferential treatment of Borrowman before, at, and after the termination of Legner and did not consider the personnel decisions regarding the positions available after the termination of Legner, whose availability was known or within the reasonable expectation of the Railroad, Shum, Olsen, and Hrebich, at the time of the termination of Legner.

(c) Ninth Circuit Court of Appeals Decision

The Ninth Circuit Court of Appeals affirmed the Judgment entered below. Addressing the specific allegations of age discrimination before it, the Ninth Circuit held that it was inappropriate to consider the positions available after termination if the clerk-stenographer position offered to and declined by Legner were the only available position to which Legner merited transfer at the time of termination. Applying a narrow "replacement" test to the transfer of "some" of Legner's tasks to Borrowman during the phase out period, the Court of Appeals found neither a replacement nor a discriminatory replacement of Legner by Borrowman. Limited to "replacement," the Court of Appeals opinion does not address the issue of the preferential treatment of Borrowman over Legner before, upon and after the termination of Legner.

Upholding the directed verdict in favor of the Railroad, the Court of Appeals' opinion rests upon a factual determination that Legner was not "qualified" for promotion to the management training program and Traffic Agent position on the basis of his numerical employee rating, and

that even if the evidence of Legner's qualifications were sufficient to establish a prima facie case of age discrimination, the Railroad had a legitimate, nondiscriminatory motive that prevented a jury from finding that age discrimination was a determining factor in the Railroad's actions. The Ninth Circuit decision does not address the exclusion of Legner from positions available after the termination of Legner any further, nor does it purport to consider the importance of the right to trial by jury on the issue before it under the ADEA.

REASONS FOR GRANTING WRIT

I

THE COURT OF APPEALS DECISION IS IN DIRECT CONFLICT WITH THE STANDING DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS AND REPRESENTS A SUBSTANTIAL DEPARTURE FROM JUDICIAL PROCEDURES UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

The Age Discrimination in Employment Act was enacted to promote the employment of older employees and to protect individual employees from discrimination based on age, 29 U.S.C. § 621 (a) and (b). The statutory prohibitions against age discrimination extend to all terms, conditions and privileges of employment and that would limit, segregate or classify older employees in a way that would *"deprive or tend to deprive"* older employees of employment opportunities or adversely affect employment status because of age, 29 U.S.C. § 623.

Unlike the enforcement provisions against race and sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et sequitur*, this Court has recognized

the right to jury trial in age discrimination cases under the ADEA in *Lorillard v. Pons,* 434 U.S. 575, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978). Subsequently, Congress amended the ADEA to expressly provide that an aggrieved person "shall be entitled to a trial by jury of *any issue of fact* in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action," 29 U.S.C. 626 (c) (2), emphasis added.

Contrary to this statutory entitlement to a trial by jury of disputed facts and inferences therefrom, the Court of Appeals' opinion affirmed the removal of factual issues regarding the "management training program" and "Traffic Agent" positions, discussed above, from the jury on defendant's motion for directed verdict after plaintiff's case in chief, finding:

> Legner was not promoted to the management training program or to the Traffic Agent position because he was unqualified. The uncontested evidence introduced by Legner was that those promotions only went to employees rated "1" or "2," and Legner had an overall rating of "3." Though one of Legner's evaluations indicated that he was ready for promotion to Traffic Agent, though one management employee of the Railroad stated that Legner was qualified *no other people* he might promote, and though Legner did introduce some statistical data, these were at most sufficient merely to establish a prima facie case, and we cannot state they were adequate even for that. Nevertheless, assuming this showing had been enough to maintain a prima facie case, the uncontradicted and overwhelming evidence that the Railroad had a legitimate, nondiscriminatory motive prevented a jury from finding that age discrimination was a determining factor in the

Railroad's actions. (Court of Appeals Opinion, Appendix A, page 4)

Resting entirely upon "judicial" findings of fact, the Court of Appeals' opinion is a substantial departure from the express statutory right to trial by jury of disputed issues of fact, including pretext and the ultimate issue of age discrimination, and stands in direct conflict with other Courts of Appeals. In *Hedrick v. Hercules,* 658 F.2d 1088 (5th Cir. 1981), the Fifth Circuit Court of Appeals found that similar evidence of qualification for available positions from remarks in annual evaluations and from other positions held was sufficient evidence to withstand a motion for directed verdict by defendant and raise a jury question. Unlike the decision below, the Fifth Circuit in *Hedrick* applied the traditional standard of review on defendant's motion for directed verdict, viewed *all* the evidence in the light most favorable to plaintiff, and followed the statutory mandate in age discrimination cases that the function of the jury, not the court, is to resolve evidence and inferences, and determine the credibility of witnesses. In *Connelly v. Joseph Schlitz Brewing Co.,* 600 F.2d 461 (5th Cir. 1979), the Fifth Circuit has also held that it is sufficient to present evidence the plaintiff was qualified "to do the job" and proffered explanations that factors other than age were the reason for adverse employment decisions against an older worker were questions for the jury to resolve, and not the court, on defendant's motion for direct.

In *Laugesen v. Anaconda Corporation,* 510 F.2d 307, 312 (6th Cir. 1975). The Sixth Circuit Court of Appeals has held that even equivocal evidence of qualifications for available positions was sufficient to raise a question of fact for the jury, not the court, to resolve in age discrimination

cases. In *McCorstin v. United States Steel Corp.*, 621 F.2d 749 (5th Cir. 1980), evidence of a pattern of age discrimination in work reductions was sufficient to establish a reasonable inference of age discrimination for the jury to resolve as trier of fact, even where the employer proffered a legitimate, nondiscriminatory motive of "just cause" for discharge.

In *Rodriguez v. Taylor*, 569 F.2d 1231, 1238-40 (3rd Cir. 1977), the Third Circuit Court of Appeals held that evidence of general qualifications and capabilities required to perform the duties of a position in issue was sufficient to establish a prima facie case of age discrimination with sufficient quantum of evidence to withstand directed verdict for defendant in an action brought pursuant to the ADEA. In *Goodman v. Heublein, Inc.*, 645 F.2d 127, 129 (2nd Cir. 1981), the Second Circuit Court of Appeals further observed that while the ADEA incorporated the enforcement remedies and procedures of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 211(b), § 216(b)-(2), and § 217, Congress expressly departed from the FLSA procedure under the ADEA by "committing the employer's state of mind to the trier of fact."[2]

In failing to submit to the jury the disputed evidence of qualifications and pretext for the failure to promote Legner to the positions of management training program and

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[2]See also *Wilson v. Sealtest Food Division of Kraftco Co.*, 501 F.2d 84 (5th Cir. 1974), reversing directed verdict for defense after plaintiff's case in chief as premature; and *compare Abrams v. Johnson*, 534 F.2d 1226 (6th Cir. 1976), holding that under Title VII, evidence of qualifications, not proof of best qualified, was sufficient to establish a Title VII prima facie case of employment discrimination; and *Obrien v. Sky Chef Inc.*, 670 F.2d 864 (9th Cir. 1982), a more recent Title VII case, holding that where, as below, the quali-

Traffic Agent, that were available prior to the termination of Legner, the Court of Appeals abrogated the function of the jury as trier of fact in direct conflict with the standing decisions of the other Circuit Courts of Appeal discussed above. The Court of Appeal's opinion below also misstates and misrepresents the record itself.

The *only* explanation proffered by the Railroad for its failure to promote Legner to the management training program position available in May, 1976 or the Traffic Agent position available in June, 1976 was its "rating" explanation. (R.T. 119-126) The "rating" explanation was not "uncontested evidence introduced by Legner" (Court of Appeals Opinion, Appendix A, page 4). The proffered "rating" explanation was the testimony of Traffic Manager Olsen. Traffic Manager Olsen was an adverse witness. Olsen's proffered "rating" explanation at trial was in direct conflict with his written evaluations that Legner was "ready for promotion" to "Traffc Agent" or to "Chief Clerk to Traffic Manager," without any expressed reservations.

Traffic Manager Olsen further admitted at trial that Legner was qualified to perform the duties of the Traffic Agent position. The disclaimer by Olsen that Legner was qualified for the Traffic Agent position, *given no competition*, was in direct conflict with Olsen's written evaluations of Legner and with the record evidence comparing

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fications for a position are *not* articulated, a pattern of exclusion creates a rebuttable presumption that each denial of promotion is discriminatory. *In contrast*, see *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), the First Circuit holding, as *dicta*, that normally plaintiff in age discrimination cases will know defendant's proffered explanations, and allocating the burden of presentation and persuasion of pretext to plaintiff on defense motion for directed verdict after plaintiff's case in chief.

Legner's qualifications for the available positions of management training program and Traffic Agent against the younger employees promoted to the respective positions in place of Legner.[5] The factual misstatements in the Court of Appeals opinion underscore the direct conflict with the Court of Appeals decisions in other Circuits and the sub-

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[5]The management training program position was a logical next step in Legner's progression of promotions and merit increases. Legner had supervisory experience. Legner had nineteen years of service. Legner knew the Railroad. He had served as liaison between the Railroad's customers and other railroad agencies. He was entrusted with the Railroad's financial matters, received high commendations as City Ticket Agent, and had "superior" ratings in handling difficult collection matters and customers (R.T. 27-49; Plaintiff Exhibits 4 and 14). Melton, had none of these qualifications. Melton was promoted from an entry level position of clerk-stenographer with receptionist and typing duties and two years employment with the Railroad (R.T. 210-212).

The Traffic Agent position was primarily a sales position with customer contact. In addition to the written evaluations and admission by Traffic Manager Olsen, noted above, Legner had received high commendations in his personnel file for performance of sales duties as City Traffic Agent. Legner had extensive customer contacts. Legner knew many of the customers involved from his previous duties. Legner received "superior" ratings in handling difficult customer problems (R.T. 27-49, 105; Plaintiff Exhibits 4 and 14). Mietz had no sales experience and little or no customer contact. Mietz had five years employment with the Railroad and was promoted from the position of a rate clerk subordinate to Legner (R.T. 127-130; Plaintiff Exhibit 7).

Both Melton and Mietz were promoted from union level positions (R.T. 129-130, 210-212, 74). Neither Melton nor Mietz were rated on the Executive and Exempt Appraisal Performance Work Sheet (*ibid.*). No evidence was introduced by the Railroad of how Melton and Mietz were rated or of any annual evaluations of their work or what their job ratings were. See also *Smith v. Farah Manufacturing Co., Inc.*, 650 F.2d 64, 68 (5th Cir. 1981), independent judgment as appropriate standard of review of factual findings on appeal.

stantial departure from jury trial of issues of fact in age discrimination cases.

In addition to the direct conflict with the standing decisions of other Circuits, this case also presents an appropriate opportunity for this Court to review the prima facie elements of age discrimination and bring uniformity to the Circuits Courts of Appeals regarding the appropriate standard of review of motions for directed verdict in age discrimination cases in the context of the statutory right to jury trial of "any issue of fact." Without such review, the various Circuits will continue to apply the Title VII formulation set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed. 2d 668 (1973) and its progeny,[4] either with varying and conflicting modifications to accommodate the right to jury trial or with no modification.

In *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), the First Circuit expressly recognized that the subtleties of the *McDonnell Douglas* formulation made for confusion when applied to jury trials. In *Laugesen, supra* at 312, the Sixth Circuit Court of appeals observed that this Court in *McDonnell Douglas* did not attempt to deal with problems and procedures inherent in submission of factual issues to juries. This Court has not addressed that issue in subsequent decisions. Even while applying the *McDonnell Douglas* formulation with modifications to age discrimination in

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[4] *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L. Ed. 2d 396, (1977) *Furnco Construction Company v. Waters*, 438 U.S. 567, 577-579, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978); and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed 2d 207, (1981).

McCorstin, supra at 753, the Fifth Circuit Court of Appeals recognized that *McDonnell Douglas* was not the "alpha and omega" of possible tests of age discrimination and that while traditional standards of review of motions for directed verdict were a necessary component, they were not sufficient.

Other Circuits are in conflict about whether to allocate the burden of presenting evidence of pretext as part of the prima facie case to withstand a motion for directed verdict by defendant after plaintiff's case in chief or whether to leave the issue of pretext for the jury to decide in light of all the evidence presented, or to accommodate the right of plaintiff to present rebuttal evidence of pretext. *Compare*, for example, the First Circuit approach in *Loeb, supra* at 1016, pretext properly resolved by Court on defendant's motion for directed verdict, in contrast to the Fifth Circuit approach in *Wilson, supra* at 86 and *Connelly, supra* at 461, issue of pretext reserved for jury; and the Sixth Circuit approach in *McCorstin, supra* at 753, reasonable inferences of age discrimination raise question for jury. See also *Marshall v. Roberts Dairy Co.*, 572 F.2d 1271 (8th Cir., 1978), business reason pretext as jury question, and *Goodman, supra* at 129, employer's state of mind reserved for jury as trier of fact. Compare also this Court's *McDonnell Douglas* restatement in *Furnco, supra* at 578, describing the right of plaintiff to present rebuttal evidence of pretext in Title VII cases.

For these reasons, there is an express need for this Court to review the elements of a prima facie case of age discrimination in the context of the statutory right to jury under ADEA and on defense motion for directed verdict after plaintiff's case in chief. This case provides a particu-

larly meaningful opportunity for review by this Court with reference to (a) failure to promote Legner to the privately recruited management training program prior to termination, (b) failure to transfer Legner to the available Traffic Agent position prior to termination, (c) statistical exclusion of all older employees from the privately recruited management training program, (d) exclusion of Legner from regional personnel planning, (e) exclusion of Legner from stated Railroad relocation policies for displaced employees, (f) preferential treatment of and retention of Legner's younger subordinate Borrowman to perform Legner's duties over Legner's objections, and (g) failure to consider or inform Legner for positions available after the termination of Legner, which positions were known or within the reasonable expectation of the Railroad at the termination of Legner.

Certiorari should be granted to bring uniformity of review to the Circuit Courts of Appeals, to define the appropriate standard of review of a prima facie case of age discrimination on a defense motion for directed verdict in light of the statutory right to jury trial of "any issue of fact," and to redress the substantial departure from the right to a jury trial of disputed evidence and inferences of age discrimination in this case.

II

THE OPINION OF THE COURT OF APPEALS EXCLUDING CONSIDERATION OF POSITIONS AVAILABLE AFTER THE TERMINATION OF LEGNER, THAT WERE WITHIN THE KNOWLEDGE OR REASONABLE EXPECTATION OF THE RAILROAD AT THE TIME OF TERMINATION, RAISES AN IMPORTANT QUESTION REGARDING THE SCOPE OF THE ADEA AND IS IN DIRECT CONFLICT WITH STANDING DECISIONS OF OTHER COURTS OF APPEALS

There are no exceptions in the ADEA, excluding future employment opportunities from the prohibition against age discrimination, especially where the availability of such opportunities is within the knowledge or reasonable expectation of the employer. The provisions of the ADEA are specifically addressed to the problems of older workers to retain employment and "regain" positions when replaced 29 U.S.C. § 621. The scope of prohibited acts extends to any discrimination in terms or privileges of employment and to any limit, segregation, or classification of older employees that would "deprive or tend to deprive" them of employment opportunities or otherwise adversely affect their employment status. 29 U.S.C. § 623(a)(1) and (2).

Clearly to demote or terminate an older employee, over his objection, in order to segregate and limit, if not totally exclude, him from positions that will become available within the knowledge or reasonable expectation of the employer is within the scope of the ADEA, 29 U.S.C. § 623 (a) (1) and (2). To further deny an older employee's request to be retained, instead of a younger subordinate employee, to perform his duties until such positions become

available creates a further inference of age discrimination, especially where the younger subordinate employee was so retained until a suitable position was available. The scope of the express statutory provisions addressed to problems of older employees to "regain" positions and to any limit, segregation or classification that would "deprive or tend to deprive any individual of employment opportunities" because of age could not be more clear.

The Court of Appeals' opinion below is in conflict with standing decisions of other Courts of Appeals. In *Loeb, supra* the First Circuit Court of Appeals reviewed employment opportunities five months after an employee's termination in determining the contour of a prima facie case of age discrimination under the ADEA. In *McCorstin, supra* at 751, the Fifth Circuit Court of Appeals examined relevant evidence of post-termination conduct by the employer as relevant to the issue of whether the employer's proffered explanation was pretext. In *Marshall v. Airpax Electronics, Inc.*, 595 F.2d 1043, 1044, (5th Cir. 1979), the Fifth Circuit also approved the right to review available subsequent positions raised by plaintiff in the complaint.

Even under the aegis of Title VII proscriptions, the Courts of Appeals have not limited review arbitrarily. In *East v. Romine, Inc.*, 518 F.2d 332, 338 (5th Cir. 1979), the Fifth Circuit Court of Appeals reviewed employment applications within a six month period following the rejection of an application for employment. In *McClelan v. Philips-Ramsey, Inc.*, 624 F.2d 70 (9th Cir. 1980), the Ninth Circuit Court of Appeals itself ruled that the *McDonnell Douglas* formulation of employment discrimination was not limited to the time of application for employment but extended to employment opportunities that became available within a one month period. Legner's request to retain

his duties instead of Borrowman until the lock box system was installed so that he would be available for suitable positions was no less a request than the request for employment in *East, supra* or *McClelan, supra.*

The holding of the Court of Appeals below, that it would be inappropriate to consider later positions after his termination if Legner declined the clerk stenographer position and it was the only available job to which he merited a transfer during the period before and at the time of his termination (Opinion, Appendix A, page 2) raises a further important question regarding the scope of the ADEA prohibitions and central role of the jury as trier of fact. As well illustrated in this case, unless positions available after termination are considered, a jury is deprived of all the relevant evidence to determine whether the employer was actively engaging in conduct to segregate out older employees by demotion to entry level positions or termination in order to deprive them of future employment opportunities within the knowledge or reasonable expectation of the employer.

Unless such positions available after termination are considered, the jury as trier of fact under the ADEA is deprived of relevant evidence in determining whether the retention of a younger subordinate employee to perform the duties of an older employee, even for three weeks, was part of a plan of preferential treatment of the younger subordinate employee over the older employee to provide such employment opportunities to him in violation of ADEA. Unless such positions available after termination, like the Chief Clerk to General Traffic Agent position in Reno on July 23, 1976 during the period of time that Borrowman continued to perform Legner's duties, are considered, the jury as trier of fact would be deprived of

relevant evidence in determining whether the offer to and withdrawal of such position from an older employee, and his exclusion from employer personnel planning was part of a "youth movement," arbitrarily discriminating against him on the basis of age.

The Court of Appeals' opinion below further conflicts with the decision of the Fifth Circuit Court of Appeals in *Bourque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61 (5th Cir. 1980) and the Sixth Circuit Court of Appeals in *Jacobs v. Martin Sweet Co., Inc.*, 550 F.2d 364, 367-370 (6th Cir. 1978). Decided under the aegis of Title VII, *Bourque* and *Jacobs* hold in similar situations that such an offer or demotion, in itself, may amount to a constructive discharge. See also *Rosado v. Santiago*, 562 F.2d 114, 119 (1st Cir., 1979), onerous transfer forcing employee to quit as constructive discharge. In *Bertrand v. Orkin Exterminating Co.*, 454 F.S. 78 (N.D. Ill., 1978), the District Court held that removal itself may be a violation of the ADEA if the jury found it was motivated by age discrimination. See also *Coates v. National Cash Register*, 433 F.S. 655 (W.D. Vir. 1977), rejection of alternative position may mitigate damages under the ADEA if the jury finds it to be comparable; it does not eliminate the discrimination.

Certiorari should be granted on this ground to resolve the conflict between the Opinion of the Court of Appeals below and the standing decisions of the Courts of Appeals in other Circuits, to define the scope of the ADEA prohibitions against age discrimination regarding positions available after termination of an older employee, especially positions within the knowledge or reasonable expectation

of the employer at the time of termination, and to review the statutory mandate of jury trial under ADEA with regard to such subsequent available positions.

CONCLUSION

For the foregoing reasons, Legner respectfully submits that the petition for certiorari should be granted.

Dated:

Respectfully submitted,

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